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IN THE

Supreme Court of the United States

October Term, 1984

ALL ALEXANDER L. KIELLAND LITIGANTS,

Petitioners,

-vs-

PHILLIPS PETROLEUM COMPANY NORWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

IN SUITS WHERE FEDERAL SUBJECT MATTER JURISDICTION IS PREDICATED ON ADMIRALTY CAUSES OF ACTION, IS THE TEST FOR PERSONAL JURISDICTION A FIFTH AMENDMENT STANDARD MEASURING DEFENDANT'S CONTACTS WITH THE UNITED STATES OR A FOURTEENTH AMENDMENT STANDARD MEASURING CONTACTS ONLY WITH THE STATE WHERE THE DISTRICT COURT SITS AND THE STATE LONG ARM STATUTE?

II.

IS THE TEST FOR PERSONAL JURISDICTION OVER A CORPORATE SUBSIDIARY ARISING FROM THE PARENT'S TRANSACTION OF BUSINESS IN THE FORUM ONE OF FORMAL, TECHNICAL CORPORATE SEPARATENESS OR UNITY OF ECONOMIC ENTERPRISE OR THE EXERTION OF SUBSTANTIAL CONTROL BY THE PARENT OVER THE SUBSIDIARY?

PARTIES TO PROCEEDINGS

PHILLIPS PETROLEUM COMPANY was a defendant in the District Court, but was not a party to the appeal to the Court of Appeals for the Sixth Circuit and is not a party to proceedings in this Court.

PHILLIPS PETROLEUM COMPANY NORWAY was a defendant in the District Court, was the appellee in the Court of Appeals for the Sixth Circuit and is Respondent in this Court.

This case involves the consolidated actions brought on behalf of 167 parties plaintiff who are the representatives of decedents or themselves survivors of a maritime catastrophe. Due to the number of parties plaintiff, they are listed in the Appendix rather than herein. All were plaintiffs in the District Court and appellants in the Court of Appeals. All are Petitioners in this Court.

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OPINIONS BELOW

The Memorandum of Opinion and order of dismissal issued by the United States District Court for the Northern District of Ohio are unreported. The per curiam opinion of the United States Court of Appeals for the Sixth Circuit and that Court's subsequent Order are also unreported. These opinions and orders are reprinted in the appendix hereto.

SUPREME COURT JURISDICTION

Upon issuance of the Court of Appeals opinion of September 17, 1984, Petitioners herein filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. On December 5, 1984, the Court of Appeals issued its order denying the Petition and clarifying its previous opinion. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

Constitution of the United States, Article III, Section 2

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Code, Section 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, Section 1333

The district courts shall have original jurisdiction, exclusive of the courts of the State, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Title 28, United States Code, Section 1391(b) and (c)

(a) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(b) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Title 28, United States Code, Section 1404(a)

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Title 28, United States Code, Section 1406(a) and (b)

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

Title 46, United States Code, Section 688

(a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b)(1) No action may be maintained under subsection (a) of this section or under any other martime law of the United States for maintenance and cure for damages for the injury or

death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources — including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by (a) vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Title 46, United States Code, Section 761

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's

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*NOTE: The term "Jurisdiction", as used in 46 USC §668(a), is in actuality a venue provision which does not alter the applicability of 28 USC § 1391(c), *Pure Oil Co* v *Suarez*, 384 US 202, 204 (1965).

wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Federal Rules of Civil Procedure, Rule 4(d)(3)

(d) The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

NO.

IN THE

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October Term, 1984

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Petitioners,

-vs-

PHILLIPS PETROLEUM COMPANY NORWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

This lawsuit arises out of a maritime catastrophe which occurred aboard the Alexander L. Kielland in the Norwegian sector of the North Sea on March 27, 1980. The Kielland, a vessel operated by Respondent Phillips Petroleum Company of Norway ("Phillips Petroleum Norway"),[1] capsized with 212 seamen aboard. Eighty-nine men were saved and the remaining 123 met their death.

Petitioners ("plaintiffs") in these 167 consolidated cases filed

[1]As the trial court noted (memorandum Opinion, p. 10, fn. 22), a bareboat charterer such as Phillips Petroleum Norway is deemed the shipowner for purposes of the liability theories asserted in these suits.

suit in the United States District Court for the Northern District of Ohio, Eastern Division,[2] asserting causes of action under the Jones Act (46 U.S.C. §688), Death on the High Seas Act (46 U.S.C. §761 *et seq.*), and general admiralty and maritime law. Respondent is a wholly-owned subsidiary of Phillips Petroleum Company ("Phillips Petroleum"). The parent, Phillips Petroleum, was a co-defendant in the District Court but is no longer a party to this case.

Both defendants filed motions to dismiss. In pertinent part, Phillips Petroleum asserted that it could not be held liable for the alleged torts of its subsidiary, and Phillips Petroleum Norway contended that the court lacked personal jurisdiction over it.[3]

In response to these contentions, plaintiffs asserted two distinct arguments, one substantive and one procedural, arising out of the relationship between Phillips Petroleum and Phillips Petroleum Norway. As to the liability of the parent, plaintiffs initially sought to impose substantive liability on Phillips Petroleum for the torts of its subsidiary. Recognizing their inability to meet the onerous burden imposed on one who would "pierce the corporate veil" for liability purposes, plaintiffs eventually abandoned this claim (Memorandum Opinion, p. 6). Accordingly, the District Court dismissed the action against Phillips Petroleum, a ruling which plaintiffs did not appeal.

Procedurally, plaintiffs contended that the relationship

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[2]Of those on the Kielland when it capsized, three were allegedly citizens of the United States. One decedent, Rolf Arthur Reme, whose parents are among the plaintiffs in this case, was a resident of the Northern District of Ohio.

[3]Both defendants also claimed the lack of subject matter jurisdiction. The District Court rejected this claim, finding that subject matter jurisdiction was properly invoked under the Jones Act which applied to the capsizing of the Kielland (Memorandum Opinion, pp. 9-12).

In view of the grounds for decision below, neither the Circuit Court nor District Court addressed the request of both defendants for dismissal on *forum non conveniens* grounds.

between parent and subsidiary, while not such as to impose liability on the parent, was nonetheless of a character that met the lesser standard required for jurisdictional purposes.[4] In essence, plaintiffs claimed that the realities of the interrelationship between Phillips Petroleum Norway and Phillips Petroleum were such that personal jurisdiction over the former could be predicated on the contacts of the latter.[5]

After allowing discovery relevant to the personal jurisdiction issue, the District Court held an evidentiary hearing. Plaintiffs filed hundreds of exhibits and the transcripts of twelve depositions, while defendants presented four days of testimony. The proofs disclosed the following information about Respondent and its parent.

The Phillips network composes a worldwide organization which is engaged in every facet of the oil business. Phillips Petroleum Company, its divisions and subsidiaries are organized into five worldwide operating groups: Exploration and Production; Gas and Gas Liquids; Minerals; Petroleum Products; and Chemicals. Each operating group is treated as a multi-national profit center. Within this framework, Phillips Petroleum Norway has been referred to as a "division" of the Exploration and Production group, and the managing director of Phillips Petroleum Norway reports directly to the Phillips Petroleum senior vice president of the Exploration and Production Group in Bartlesville, Oklahoma.

The Phillips network is also organized geographically through divisions and subsidiaries. In the United States,

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[4]In this regard, it has been recognized that a substantially lesser showing of parent control over the subsidiary is required for personal jurisdiction purposes than would be required for the imposition of substantive liability on the parent. *Hargrave* v *Fibreboard Corp*, 710 F2d 1154, 1157 (5th Cir, 1983); *Rollins* v *Proctor & Schwartz*, 478 F Supp 1137, 1143, fn. 13 (DC NC, 1979); *Reul* v *Sahara Hotel*, 372 F Supp 995, 997 (SD Tex, 1974).

[5]Defendants have conceded that the acts of Phillips Petroleum in Ohio are ample for the assertion of personal jurisdiction over the parent. Thus, if these acts may be imputed to the subsidiary, *in personam* jurisdiction over Respondent would unquestionably lie.

Phillips Petroleum operates through geographic divisions known as the Eastern Division and Western Division. The overseas geographic units are organized as subsidiary corporations.[6] Phillips Petroleum Norway is one of more than fifty geographical subsidiaries bearing the "Phillips Petroleum Company" name.[7]

The initial contract for oil exploration in the Norwegian sector of the North Sea was executed by the parent in its own name. Thereafter, at the behest of the Norwegian government, Phillips Petroleum Norway was formed to carry out its parent's undertaking. To accomplish this, Phillips Petroleum Norway was capitalized by the parent and the parent guaranteed the obligations of the subsidiary.

All of the oil produced by Phillips Petroleum Norway is sold to Phillips Petroleum overseas and resold by Phillips Petroleum in the United States and elsewhere.[8] Phillips Petroleum Norway accounts for about 30% of the energy produced by the Phillips network. The profits generated by the subsidiary are distributed to the parent as dividends and in this fashion Phillips Petroleum Norway generates about 25% of the total profits of the Phillips enterprise.

Both Phillips Petroleum and Phillips Petroleum Norway

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[6]When American oil companies engage in oil exploration in foreign countries, these countries traditionally insist that an overseas subsidiary be established. See *Energy Resources Group, Inc* v *Superior Oil Co*, 460 F Supp 483 (Kans, 1978); *Edwards* v *Gulf Mississippi Marine Corp*, 449 F Supp 1363 (SD Tex, 1978).

[7]The corporate name for these subsidiaries, as in the case of Phillips Petroleum Company Norway, is "Phillips Petroleum Company [country]" such as Phillips Petroleum Company Argentina, Phillips Petroleum Company Bolivia, Phillips Petroleum Company Germany, Phillips Petroleum Company Nicaragua, etc.

[8]The roles in this case are reversed from the paradigm often found in the manufacturing industry where a foreign manufacturer establishes a local subsidiary as distributor of its product. Insofar as Phillips Petroleum serves as the conduit by which Phillips Petroleum Norway sells its product to ultimate consumers in the Ohio marketplace, the jurisdictional implications are analogous to those arising in the customary manufacturing setting.

(and other subsidiaries as well) are incorporated in Delaware and maintain their primary corporate offices at the Phillips complex in Bartlesville, Oklahoma. A number of officers and managerial employees are employed by both Phillips Petroleum and Phillips Petroleum Norway, although no individual serves on the Board of Directors of both corporations.

In addition, lay employees are often trained by the parent and freely transferred from parent to subsidiary or between subsidiaries. Employees of parent and subsidiary alike are covered by the parent's pension plan.

Phillips Petroleum also performs what can be called "management services" for both itself and its subsidiaries. For example, Phillips Petroleum invests not only its own short term cash but invests for its subsidiaries as well. The Phillips Petroleum corporate purchasing agent is in charge of purchasing American equipment for its subsidiaries. Phillips Petroleum engineering personnel supervise Phillips Petroleum Norway's projects. Phillips Petroleum's insurance program purchases insurance for the subsidiaries, and both the parent and subsidiaries are covered by the same insurance policies.

For such transactions, Phillips Petroleum Norway is assessed its *pro rata* share of the cost. At the end of the month, the respective liabilities for dividends, management services, and oil purchases are set off against each other and the remaining indebtedness is paid off by a transfer from one's account at the City Bank in New York to the other's account at the same bank.

For internal accounting purposes, some subsidiaries have their own accounting departments and employees, while others use the accounting staff of Phillips Petroleum. Phillips Petroleum has its own accounting system. However, the same certified accounting firm is generally used throughout the Phillips system, and Phillips Petroleum and its subsidiaries file consolidated returns for federal income tax purposes.

There have been unsecured loans back and forth between

Phillips Petroleum and Phillips Petroleum Norway, but these have been repaid. The interest rates on the loans and the purchase price for Phillips Petroleum Norway's oil have ordinarily been at competitive commercial rates. Phillips Petroleum Norway cannot make sufficiently substantial expenditures without first obtaining the approval of Phillips Petroleum.

The internal legal staff at Phillips Petroleum is available to advise the subsidiaries. In litigation involving Phillips Petroleum and Phillips Petroleum Norway, both are often represented by the same counsel. Releases issued in litigation against one corporation absolve both.

No credibility issues arose in the District Court, the point of contention being the jurisdictional result required under these facts. The issue of personal jurisdiction over Phillips Petroleum Norway was thereby presented for decision.

Citing rulings of this Court regarding the ability of a state court [or a federal court whose jurisdiction is invoked solely on diversity grounds], consistent with the Fourteenth Amendment, to adjudicate the rights of non-residents, the District Court framed the issue as follows:

> "In order for a federal court to have personal jurisdiction over a nonresident defendant, the court must find that the long-arm statute of the forum state provides for jurisdiction in the context under scrutiny and that the contacts of the defendant with the forum state are sufficient so as not to offend due process." (Memorandum Opinion, p. 12).

Quoting the Ohio long-arm statute, the District Court undertook to determine whether Phillips Petroleum Norway had sufficient contacts with Ohio to satisfy the Fourteenth Amendment requirement of "minimal contact with the forum state" (Memorandum Opinion, p. 13).

The District Court then relied on Sixth Circuit diversity cases and *Cannon Manufacturing Co* v *Cudahy Packing Co,* 267 US 333 (1925) ("*Cannon*"). As it read those cases, the District Court concluded that although "Phillips exerts substan-

tial control over its subsidiaries" (Memorandum Opinion, pp. 8, 17, fn. 35), this did not allow the contacts of the parent with Ohio to be used to establish personal jurisdsiction over Respondent. In its view, "*so long as the separation of the parent corporation from the commerce of the state is real and not merely superficial* the parent will be insulated from the *in personam* reach of the state's courts" (Memorandum Opinion, p. 15; emphasis in the original).

Considering plaintiff's admission that Phillips Petroleum Norway did not directly do business in the Northern District of Ohio (Memorandum Opinion, p. 16) and plaintiffs' concession that they were not seeking to "pierce the corporate veil" for liability purposes,[9] the court declined to impute the business done by Phillips Petroleum to Phillips Petroleum Norway. In the District Court's view, *Cannon* required looking only to the formalities of corporate segregation and that, in view of that formal segregation, the Court lacked personal jurisdiction over Phillips Petroleum Norway.

Accordingly, the District Court dismissed the action against Phillips Petroleum Norway. The Court did not indicate why outright dismissal was granted rather than a transfer to the District Court of Oklahoma or Delaware which would have jurisdiction under the Court's analysis[10] (Memorandum Opinion, p. 17). Having decided the case on jurisdictional grounds, the District Court did not address Respondent's alternative argument that service of process was defective.

In essence, then, the District Court adopted the following rulings of law:

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[9]The error of the District Court in equating "piercing the corporate veil" for liability purposes with the showing required for personal jurisdiction purposes is addressed by the cases cited in fn. 4.

[10]Under *Goldlawr, Inc* v *Heiman*, 369 US 463 (1962) the finding of lack of personal jurisdiction was no impediment to a transfer pursuant to 28 USC §1406(a). The District Court did not articulate any special circumstances for departing from the presumption implicit in *Goldlawr, Inc* that transfer, rather than dismissal, is the appropriate remedy in a case such as this.

(1) In this case, arising under federal statutes, the appropriate focus is on Fourteenth Amendment considerations and the breadth of the long arm statute of the state in which the court sits.

(2) Personal jurisdiction cannot be predicated on Respondent's aggregate contacts with the United States, but only on its contacts with the Northern District of Ohio.

(3) Personal jurisdiction over Respondent cannot be predicated on the parent's distribution in Ohio of oil products produced by Respondent and sold by it to the parent for local resale.

(4) The contacts of the parent with the Northern District of Ohio could not be considered as to jurisdiction over the subsidiary under *Cannon* because of the formal corporate segregation.

(5) The appropriate remedy was dismissal rather than a transfer.

Plaintiffs then pursued an appeal of right to the Court of Appeals for the Sixth Circuit, taking issue with each of these conclusions. On September 17, 1984, the Court issued its unpublished per curiam opinion of affirmance. The only discussion of the Sixth Circuit's reasoning was that, "[a]fter considering the arguments presented by the parties we conclude that the district court did not err in dismissing the claim against Phillips Norway for lack of personal jurisdiction" (Opinion, p. 3).

Plaintiff then filed a timely petition for rehearing. While denying rehearing, the Court clarified its opinion by disavowing the trial court's reliance in this federal statutory action on the Fourteenth Amendment principles applied to the state court or federal diversity action.[11] It opined:

[11] It is difficult to tell from the clarifying opinion whether the Circuit Court intended to approve of the District Court's Fourteenth Amendment analysis (as the citation to *Cannon* and other diversity cases suggests), or whether it tacitly acknowledged that the District Court's Fourteenth Amendment analysis was erroneous but did not affect the outcome. If the latter

continued

"This case hinges upon a line of cases that held if a subsidiary is tantamount to a mere department or division of the parent, then the subsidiary and the parent are treated as one for jurisdictional purposes. . . .

The district court . . . concluded that plaintiffs had not met their burden of showing that the activities of the parent and subsidiary are so closely interconnected that the acts of one could be said to be the acts of the other. The district court found that Phillips Petroleum and Phillips Norway were not sufficiently integrated to be considered one entity for jurisdictional purposes. This finding was not clearly erroneous.[12] Consequently,

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construction of the Circuit Court's clarifying order is the more accurate, that Court failed to apply the applicable aggregate national contacts test, for under that test Respondent had ample United States contacts to be subject to the exercise of personal jurisdiction by the American court system. Neither the District Court nor Circuit Court considered any other basis on which the District Court might, despite the presence of personal jurisdiction, decline to entertain this suit.

[12]The use of the "clearly erroneous" standard by the Sixth Circuit is itself noteworthy. Where, as here, the evidence is not subject to serious credibility dispute, it is far from clear why the "clearly erroneous" standard ordinarily applied to findings of fact should be employed in review of a question of law: whether those undisputed facts meet legal jurisdictional requirements.

Even more puzzling is the Circuit Court's use of the "clearly erroneous" standard to sustain findings which the District never made! The District Court *did not* apply a "mere department or division", "closely interconnected" or "sufficiently integrated" test of jurisdictional imputation. To the contrary, the District Court *recognized* the substantial control exercised by Phillips Petroleum but concluded that the "formal corporate separation" test of *Cannon* foreclosed consideration of the rationales for jurisdictional imputation mentioned by the Circuit Court.

The "clearly erroneous" standard is to be rationally applied only to review of the conclusions reached by a trial judge who applies the correct legal standard. Where the trial judge reaches no such conclusion because of his application of the wrong standard there is nothing to which a "clearly erroneous" standard may be properly applied. If, as the Circuit Court suggested, the relevant tests are "mere department or division", "closely interconnected" or "sufficiently integrated", the Court should have remanded to the District Court for consideration under those tests which the District Court never applied. As an alternative to granting *certiorari*, Petitioners request that the Court summarily reverse and remand to the District Court for further proceedings free from the improper construction of *Cannon* as requiring dismissal on the mere basis of formal corporate separateness.

service on Phillips Petroleum did not operate as service on Phillips Norway."[13]

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

The subject of personal jurisdiction is among the most fundamental elements of the power of the judiciary. Since *International Shoe Company* v *Washington*, 326 US 310 (1945) ("*International Shoe*"), this Court has considered a number of cases which draw in question the constitutional authority of a court to adjudicate the rights of a non-resident.

Notably, however, this Court's opinions have considered only the authority of a *state* court, consistent with the *Fourteenth Amendment.* The Court's opinions on point arise either from the state court system or from cases invoking federal *diversity* jurisdiction [where, under diversity jurisprudence, the federal court is to apply the relevant state long-arm statute]. This Court has never pointedly considered the principles of *in personam* jurisdiction to be applied in cases arising in the

[13]The Sixth Circuit's confusion between personal jurisdiction and service of process ("Phillips Petroleum and Phillips Norway were not sufficiently integrated to be considered one entity for jurisdictional purposes [so] service on Phillips Petroleum did not operate as service on Phillips Norway", clarification order, p. 2) need not detain the Court. In the parent-subsidiary context, where a non-resident corporation is "doing business" in a district within the meaning of 28 USC §1391(c) through an affiliated corporation, the affiliated corporation is ordinarily deemed the "agent" of its non-resident affiliate for purposes of F.R. Civ. P. 4(d) (3). Thus, while personal jurisdiction and service of process are conceptually distinct, in the practical setting of a case such as this, both rise or fall under the same legal test. See *Edwards Gulf Mississippi Marine Corp, supra; Allan* v *Brown & Root, Inc*, 491 F Supp 398 (SD Tex, 1980); *Schmid* v *Roehm GmbH*, 544 F Supp 272, 278 (Kans, 1982); *IAM National Pension Fund* v *Wakefield Industries*, 699 F2d 1254, 1257 (App DC, 1983) *Terry* v *Raymond International, Inc, supra.* Accordingly, the discussion in this Petition will draw on both cases which consider the parent-subsidiary relationship for personal jurisdiction purposes and those which address that relationship in the service of process context. And, while diversity cases present separate considerations than federal question cases, reference will be made to diversity cases which consider the parent-subsidiary relationship in applying state long-arm statutes which use language comparable to the "doing business" verbiage of 28 USC §1391(c).

federal courts under the court's subject matter jurisdiction over causes of action arising under federal statutes. This case presents the opportunity to address that yet unresolved point.

One would think it quite apparent that *International Shoe* and its progeny have no application to the question of a federal court's authority in a federal statute case to adjudicate the rights of a non-resident of the district in which the court sits. This is so because of the truism that a state long-arm statutes and the Fourteenth Amendment operate as restraints only on the States and the judicial power of state courts.[14] Indeed, most authorities have recognized that the personal jurisdiction questions presented in a case like this are not controlled by *International Shoe* and its progeny. NOTE: Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard, 95 Harvard L Rev 470 (1981); 2 Moore, Federal Practice, ¶ 4.25[5] at 4-260; *Haile* v *Henderson National Bank,* 657 F2d 816, 825 (6th Cir, 1981); *Handley* v *Indiana & Michigan Electric Co,* 732 F2d 1265, 1268 (6th Cir, 1984); *Terry* v *Raymond International, Inc.*, 658 F2d 398, 402-403 (5th Cir, 1981); *Lapeyvouse* v *Texaco, Inc*, 693 F2d 581, 585 (5th Cir, 1982; *Fitzsimmons* v *Barton,* 589 F2d 330, 332-333 (7th Cir, 1979); *FTC* v *Jim Walter Corp,* 651 F2d 251, 255 (5th Cir, 1981).

Other cases, like the District Court opinion in this case, take the contrary approach and hold that personal jurisdiction in

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[14]Notably, there is no federal long-arm jurisdictional statute comparable to those considered in the *International Shoe* line of authority. The closest analogous federal statute is the venue statute [28 USC §1391(c)], which makes proper any venue where the defendant is "doing business". This statutory scheme is to be viewed in light of the breadth of judicial power conferred by Article III, Section 2 of the Constitution ("The Judicial Power shall extend to all cases . . . arising under . . . the Laws of the United States [and] to all Cases of admiralty and maritime Jurisdiction"). These considerations underscore the wisdom of treating the pivotal issue as whether the courts of the United States as a whole may adjudicate the defendant's rights, rather than treating the district courts as fragmentary units whose authority is restricted by the artificial state boundaries of federal judicial districts.

federal question cases is governed by state long-arm statutes and diversity opinions. See *Bursten* v *State Bar of California*, 693 F2d 511 (5th Cir, 1982); *DelMelo* v *Touche Marine, Inc*, 711 F2d 1260 (5th Cir, 1983).

Notwithstanding the Sixth Circuit's disclaimer, the decision below can only be sustained under the approach of *Bursten* and *DeMelo*. Under the competing "aggregate contacts" analysis, Respondent's Delaware incorporation and Oklahoma home offices are plainly sufficient contact with the United States to allow this country's federal court system to determine its rights and liabilities.

This is not to suggest that Phillips Petroleum Norway's protestations of inconvenience and unfairness of an Ohio venue have no available outlet. Concededly such considerations might be applied in a motion to decline jurisdiction on *forum non conveniens* grounds, a motion to transfer under 28 USC §1404, or a Fifth Amendment due process challenge.[15] Here, no such motion has been decided, the ruling below being predicated solely on the question of personal jurisdiction. Thus, if the Court were to adopt the "aggregate contacts" line of authority, the required result would be reversal of the jurisdictional ruling with other undecided issues remaining open for resolution by the lower courts.

In short, this case presents the fundamental question of the scope of the federal judiciary's power to exercise personal jurisdiction over a defendant in a case arising under the sub-

[15]Cases arising in the Fourteenth Amendment due process setting strongly suggest that a Fifth Amendment challenge by Respondent would be unavailing. In *World-Wide Volkswagen Corp* v *Woodson*, 444 US 286, 298 (1980), this Court noted, "If the sale of a product of a manufacturer . . . arises from the efforts of the manufacturer to serve, directly or indirectly, the market for its product in other States . . . it is not unreasonable to subject it to suit in one of those States." In *Mobil Oil Corp* v *Commissioner of Taxes*, 445 US 425 (1980), this Court, noting the integrated nature of the oil industry, found no due process violation in a State's exercise of its taxing authority over profits produced by non-resident subsidiaries of a parent oil corporation doing business in the State.

ject matter jurisdiction to decide admiralty cases and those based on federal statute [28 USC §1333(1); 46 USC §688(a); 46 USC §761]. This fundamental issue has never been addressed by this Court. The lower courts presented with the question have reached conflicting decisions such that the outcome of a controlling *federal* question turns on the sheer fortuity of the Circuit in which the case is brought. Resolution of the split of authority, which may be outcome-determinative of this case, should be undertaken. Certiorari should be granted.

Moreover, even under the erroneous analysis adopted below, issues warranting certiorari are presented. Primary among these are whether, under the "doing business" standard of 28 USC §1391(c), the acts of a corporation affiliated with the defendant in the forum district are to be disregarded whenever the bare formalities of corporate separation are observed by the maintenance of separate corporate books, as suggested by *Cannon*. And, if observance of corporate formality is not decisive, the issue presented is which of the divergent tests applied by the lower courts governs the characteristics of the parent-subsidiary relationship which allow the forum district activity of one corporation to be considered in assessing whether the court may exercise personal jurisdiction over the non-resident affiliate.

These are questions which have divided the lower courts and have not been addressed by this Court. The chaotic nature of the law on such essential points of federal jurisdiction, which are outcome-determinative of these cases and countless others like them, should be resolved by this Court on certiorari.

This Court's only decision addressing the jurisdictional implications of the parent-subsidiary relationship is *Cannon*, a diversity case decided prior to *Erie R Co* v *Tompkins*, 394 US 64 (1938), which applied the "presence" test later discarded in *International Shoe*. In *Cannon*, this Court held that personal jurisdiction could not be asserted over a non-resident parent

on the basis of its subsidiary's presence in the forum state. This conclusion was predicated on the observance by parent and subsidiary of the bare corporate formalities of sepration.

The District Court relied heavily on *Cannon* in concluding that the acknowleged substantial control exerted by Phillips Petroleum over Phillips Petroleum Norway (Memorandum Opinion, pp. 8, 17, fn. 35) was without jurisdiction significance becase *"so long as the separation of the parent corporation from the commerce of the state is real and not merely superficial,* the parent will be insulated from the *in personam* reach of the state's courts" (Memorandum Opinion, p. 15; emphasis in the original). The Circuit Court likewise cited *Cannon* in support of its decision.

Reliance on the continued viability of *Cannon* and its emphasis on corporate formality has been far from uniform.[16] Many courts and commentators have concluded that, with the demise of the presence test employed in *Cannon*, that case is of little, if any, value in assessing the jurisdictional implications of the parent-subsidiary relation in modern litigation. See Cardozo, A New Footnote in Erie v Tompkins: Cannon is Overruled, 36 NCL Rev 181 (1958); Wellborn, Subsidiary Corporations in New York: When is Mere Ownership Enough to Establish Jurisdiction Over the Parent, 22 Buff L Rev 681 (1973); *Finance Co of America* v *Bankamerica Corp*, 493 F Supp 895, 905-906 (Md 1980); *Curtis Publishing Co* v *Cassel*, 302 F2d 132 (Tenth Cir, 1962). Indeed, this Court's decision in *United States* v *Scophony Corp*, 333 US 795 (1948), finding

[16] *Cannon* has widely been cited for the black letter principle that the parent-subsidiary relationship does not, by itself, allow the exercise of jurisdiction over one entity on the basis of the other's contact with the forum. As we understand this tenet, it simply holds that mere ownership of stock does not subject a stockholder to suit where the owned company does business. We do not question this tenet in a setting unlike this case where the stockholder (individual or corporate) does no more than the bare essentials inherent in ownership: exercise of control through stock voting rights without commercial transactions with the owned company or active participation in the owned company's day to day affairs.

jurisdiction over the English parent on the basis of its subsidiary's conduct in the forum district under the "transacts business" test of the Clayton Act, belies any suggestion that *Cannon* erects an inflexible "corporate formality" barrier to the assertion of personal jurisdiction on the basis of the acts of a corporate affiliate.

And, in the sixty years since *Cannon* was decided, the development of corporate structures to promote emerging international commerce has resulted in a modern economy far different than that of the 1920's. The economic changes of the post-World War II era are chronicled in *Bulova Watch Co, Inc* v *K Hattori & Co, Ltd*, 508 F Supp 1322 (ED NY, 1981).

With the development of expansive corporate structures, this Court has shifted its focus from the corporate formality approach of *Cannon* to a more pragmatic approach to the parent-subsidiary relationship. Thus, in *Mobil Oil* and *Exxon Corp* v *Wisconsin Department of Revenue*, 447 US 208 (1980), the formalities of corporate accounting and use of the parent-subsidiary (rather than division) structure were found inadequate to compel treating the various components of an integrated oil enterprise as separate entities for taxation purposes. And, in *Copperweld Corp* v *Independence Tube Corp*, 467 US _____ (1984), the court declined to exalt the form of separate incorporation over the substance of a single enterprise, holding that the unity of economic interest required treating the parent and subsidiary as a single entity incapable of conspiring to violate the Sherman Act.

Despite the inherent limitations in *Cannon* and the recent change in focus of this Court's view of the parent-subsidiary relationship, many courts, like the lower courts in this case, have found the corporate formality analysis the acid test of jurisdictional imputation. See, for example, *Harris* v *Deere & Co*, 223 F2d 161 (4th Cir, 1955); *Berkman* v *Ann Lewis Shops, Inc*, 246 F2d 44 (2nd Cir, 1957); *Quaker State Dyeing & Finishing Co, Inc* v *ITT Terryphone, Inc* 461 F2d 1140 (3rd

Cir, 1972); *Croyle* v *Texas Eastern Co*, 464 F Supp 377, 379 (Pa, 1979). Under this analysis, personal jurisdiction over one corporation on the basis of its affiliate's contacts will be allowed only where the parent and subsidiary have abused or disregarded the formal structure, or where the parent has exercised such dominance that the subsidiary is said to have lost its independent legal status. *Schmid* v *Roehm GmbH*, 544 F Supp 272, 274 (Kans, 1982) ("if the parent so controls and dominates the subsidiary as in effect to disregard the latter's independent corporate status") [citing Restatement (2d), Conflict of Laws, §52 (comment b)]; *Rollins* v *Proctor & Schwartz*, 478 F Supp 1137, 1146 (NC, 1979); *Stanley Works* v *Globemaster, Inc*, 400 F Supp 1325, 1331-1333 (Mass, 1975) ("parent and subsidiary have disregarded all but the formalities of separation"; "no real semblance of individual identity"); *Leach Co* v *General Sani-Cam Mfg Corp*, 393 F2d 183, 185 (7th Cir, 1968); *Lakota Girl Scout Council, Inc* v *Haney Fund Raising Management, Inc*, 519 F2d 634, 637 (8th Cir, 1974); *Hargrave* v *Fibreboard Corp*, 710 F2d 1154, 1159 (5th Cir, 1983).

Most courts have eschewed the "corporate formality" litmus test implied in *Cannon*, and have recognized that certain practical characteristics of a given corporate-subsidiary relationship allow the exercise over personal jurisdiction over one corporation on the basis of the forum contacts of its affiliate. Even the courts taking this general approach are deeply split on the relevant characteristics, with the outcome of a given case often turning on the semantical test applied.

Some cases focus on the the essential unity of economic purpose or integration of corporate conduct and have adopted the same essential "integrated enterprise" or "unitary business" test utilized in the taxation setting by this Court in *Mobil Oil Corp* and *Exxon Corp*. Such a test is advocated in Wellborn, Subsidiary Corporations in New York: When is Mere Ownership Enough to Establish Jurisdiction over the Parent, 22

Buff L Rev 681, 688 (1973) ("when, considering the nature of the business activities of each corporation and the dealings between them, it clear that the two are component parts of the same enterprise"). This approach is exemplified by *Edwards* v *Gulf Mississippi Marine Corp*, 449 F Supp 1363 (SD Tex, 1978) ("the operations of [the subsidiary] are significantly integrated with those of [the parent] to the extent that . . . their corporate separateness should be disregarded").[17]

In a related vein, other cases, consistent with *Copperweld*, *Mobil Oil* and *Exxon Oil*, have posited that the parent's use of a subsidiary structure, rather than division or department structure, is to be accorded no significance for jurisdictional purposes. Under this approach the formality of separate incorporation is disregarded where the subsidiary is the functional equivalent of an unincorporated division or department. Thus, the subsidiary's local contacts will be imputed to the parent, if the subsidiary "is in effect a local department separately incorporated" *Bulova Watch Co, Inc, supra*; *Jayne* v *Royal Jordanian Airlines Corp*, 502 F Supp 848 (SD NY, 1980).[18]

Other cases have looked not to corporate formality or unity of enterprise but to the control exercised by the parent over

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[17] *Edwards* is factually indistinguishable from the instant case. *Edwards* involved an action arising under the Jones Act and Death on the High Seas Act as a result of a death in the waters of Iran. Jurisdiction over the non-resident subsidiary was upheld on the basis of the parent's American contacts where, as here, the parent and subsidiary were engaged in an integrated enterprise and the parent purchased the subsidiary's insurance and maintained its employees on the parent's pension plan. As *Mobil Oil Corp* and *Exxon Corp* attest, the "integrated enterprise" standard is particularly suited to the corporate nuances of the oil industry.

[18] Application of this test would presumably lead to a finding of personal jurisdiction in the instant case, as Phillips Petroleum Norway's Norwegian activities are those which, prior to its formation, were commenced by Phillips Petroleum in its own name. Also, there is little functional difference between the parent's foreign geographical subsidiaries and its domestic geographical divisions.

the subsidiary. The cases looking to control vary widely in formulating the degree of control required for jurisdictional imputation.

The most generous concept of control was articulated in *Reul* v *Sahara Hotel*, 372 F Supp 995 (Tex, 1974). Recognizing that the law had historically considered only the legal implications of bare stock ownership, the *Reul* Court allowed jurisdictional imputation where there was "more than that amount of control . . . [that] mere common ownership and directorship would indicate".[19]

Other cases have looked to whether the control exerted was such as to make the subsidiary the "alter ego" of the parent. See *Kramer Motors, Inc* v *British Leyland, Ltd*, 628 F2d 1175, 1177 (9th Cir, 1980).

Still others have viewed the question as being whether the control exerted is such as to make one corporation the "agent" of "instrumentality" of the other. *Fitz-Patrick* v *Commonwealth Oil Co*, 285 F2d 726 (5th Cir, 1960); *Kramer Motors, Inc; Finance Company of America* v *Bankamerica Corp*, 493 F Supp 895, 907 (Md, 1980); *Energy Resources Group Inc* v *Superior Oil Co*, 460 F Supp 483, 490 (Kans, 1978).[20]

Control principles were also applied in *Star Lines, Ltd* v *Puerto Rico Marine Shipping Authority*, 442 F Supp 1201 (SD NY, 1978) (whether "the parent corporation controls the day-

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[19]The *Reul* standard would surely dictate denial of Respondent's Motion to Dismiss in this case and, indeed, any case where the parent's participation in the subsidiary's affairs transcended the passive control ordinarily incident to mere stock ownership.

[20]While the "agent" or "instrumentality" standard is ordinarily considered a stringent one, the cases applying this standard do so in different fashions. Jurisdiction over the subsidiary was found to exist in *Energy Resources Group, Inc* under a corporate arrangement indistinguishable from that presented in this case (subsidiary and parent both incorporated in United States; subsidiary conducts oil activities in the North Sea; parent does business in forum state).

to-day business operations of its subsidiary") and *Walker* v *Nugent*, 583 F2d 163, 167 (5th Cir, 1978) ("such a degree of control by [the parent] as to permit the business done . . . by [the parent] to be imputed to its subsidiary").

In essence, then, there is a split of authority as to which feature of the parent-subsidiary relationship allow the acts of a resident to be imputed to its affiliated non-resident defendant. The lower courts have looked to three essentially distinct characterics: corporate formality, unity of enterprise, and control. The lack of uniformity on this point means that the existence or non-existence of personal jurisdsiction in factually indistinguishable cases varies from circuit to circuit.

Petitioners submit that in a unitary federal judiciary, a principle as elemental as personal jurisdiction demands uniform application under a settled national standard. This Court should take the opportunity to establish a uniform national standard by addressing a point which has not been addressed by the Court, at least no since *Cannon*: when may the local contacts of a corporation affiliated with a non-resident defendant be considered in the personal jurisdiction equation. In sum, the Court should grant *certiorari*.

Finally, as the above discussion reflects, litigants can only guess when they file suit as to the facts which will be unearthed after extensive discovery and the legal standard ultimately applied. In enacting 28 USC §1406(a), Congress sought to provide for transfer in order to avoid imposition of the Draconian sanction of dismissal on plaintiffs whose jurisdictional guess was found erroneous. *Goldawr, Inc* v *Heiman*, 369 US 463, 466-467 (1962). Neither lower court expressed any reason why, as an alternative to dismissal, this case should not be transferred to Oklahoma or Delaware. In the event that this Court should deny *certiorari*, petitioners request that the

Court remand with directions to transfer venue pursuant to §1406(a).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALL ALEXANDER L. KIELLAND LITIGANTS,	CASE NOS. C82-31
Plaintiffs,	C82-196 through 243
	C82-581 through 604
v.	C82-605 through 632
	C82-633 through 695
PHILLIPS PETROLEUM COMPANY, INC., et al.,	C82-1260 through 1262
Defendants.	Judge John M. Manos

MEMORANDUM OF OPINION

Between January 6 and May 10, 1982, 167 related cases were filed in this court under the Jones Act, 46 U.S.C. §688[1] and the Death on the High Seas Act, 46 U.S.C. §§761-768.[2]

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[1] 46 U.S.C. §688 provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

[2] 46 U.S.C. §761 provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Plaintiffs are all individuals or representatives of individuals who were aboard the Alexander L. Kielland, a semi-submersible drilling rig, when it capsized off the coast of Norway on March 27, 1980. These cases are currently before the court on separate motions to dismiss by defendants, Phillips Petroleum Company (Phillips) and Phillips Petroleum Company Norway (Phillips Norway). Phillips asserts that: (1) plaintiffs fail to state a claim upon which relief can be granted, (2) the court lacks subject matter jurisdiction, and (3) dismissal is proper under the doctrine of *forum non conveniens*. Phillips Norway, as grounds for its motion, asserts that: (1) the court lacks subject matter jurisdiction, (2) process and service of process were insufficient, (3) the court lacks personal jurisdiction, and (4) dismissal is proper under the doctrine of *forum non conveniens*.

Following discovery, limited to the scope of defendants' motions to dismiss, the court held a preliminary hearing for four days, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure.[3] Upon consideration of the testimony presented at the preliminary hearing, the evidence received, and the briefs submitted by the parties, the court finds that (1) plaintiffs fail to state a claim upon which relief can be granted with respect to Phillips, and (2) the court lacks personal jurisdiction over Phillips Norway. Accordingly, defendants' motions to dismiss are granted.

I

Phillips is a Delaware corporation with its principal place of business in Bartlesville, Oklahoma. Phillips Norway is a Delaware corporation with its principal place of business in

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[3] Fed. R. Civ. P. 12(d) provides:

> The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

either Bartlesville, Oklahoma or Norway.[4] At the time of the Kielland accident, Phillips owned one-hundred percent (100%) of the corporate stock of Phillips Norway.[5]

Phillips and its subsidiaries are engaged in petroleum exploration and production on a worldwide basis. Phillips products are sold in all fifty states and in about ninety countries. One of Phillips' most important petroleum operations is the Greater Ekofisk Development in the Norwegian North Sea. In 1981, the Ekofisk operations accounted for approximately thirty percent (30%) of Phillips' total energy production.[6] Phillips Norway and its co-venturers are the owners of the license issued by the Kingdom of Norway that covers the Ekofisk field — License 018.[7] Phillips Norway is the operator of this field. All of the oil produced from the Ekofisk field is delivered by pipeline to Teeside, England, and

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[4] For the purposes of defendants' motions, it makes no difference whether Phillips Norway's principal place of business is in Oklahoma or Norway. 28 U.S.C. §1332(c) provides in pertinent part:

> (c) for the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .

Cf. Willems v. Barclays Bank D.C.O., 263 F.Supp. 774 (S.D.N.Y.1966)(holding section 1332(c) does not give dual citizenship to a domestic corporation with its principal place of business in a foreign country). *See also: Jerguson v. Blue Dot Investment, Inc.*, 659 F.2d 31 (5th Cir. 1981), *cert. denied*, U.S. , 102 S. Ct. 2013 (1982).

[5] Subsequent to the time of the Kielland accident, Phillips transferred the stock of Phillips Norway to Phillips Petroleum International Investment Company, a wholly-owned subsidiary of Phillips.

[6] Phillips Petroleum Company 1981 Annual Report (Plaintiffs' Exhibit 1), at 10.

[7] License 018 is owned by Phillips Norway and its co-venturers in the following percentages:

36.960%	Phillips Petroleum Company Norway
30.000%	Norsk Fina A/S, a Norwegian subsidiary of a Belgian company
13.040%	Norsk Agip A/S, a Norwegian subsidiary of an Italian company
8.094%	Elf Aquitaine Norge A/S, a Norwegian subsidiary of a French company

continued

Phillips Norway sells all of its oil to Phillips, its parent corporation.[8]

On July 15, 1976, Phillips Norway entered into a Bare Boat Charter agreement with Stavanger Drilling II A/S, a Norwegian corporation. Pursuant to this agreement, Phillips Norway took under bare boat charter the Alexander L. Kielland, a semi-submersible drilling rig owned by Stavanger II A/S. The Kielland was a Norwegian flag vessel. Although it was designed and built in France as a drilling platform, it has always been used as an accommodation platform. The charter provided that Phillips Norway would use the Kielland as an accommodation platform in connection with its oil and gas operations in the North Sea. The charter also provided that Phillips Norway would assume exclusive dominion and control of the vessel during the term of the charter. According to Article VI of the Bare Boat Charter:[9]

> Charterer[Phillips Norway] shall man, navigate, maintain and supply the Vessel at its sole cost and expense and shall pay all charges and expenses of every kind and nature whatsoever incident thereto and pay all fines and penalties levied against the Vessel, it being understood that Owner retains no dominion, control,

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6.700% Norsk Hydro A/S, a Norwegian subsidiary of a French company

4.047% Total Marin Norsk A/S, a Norwegian subsidiary of a French company

0.456% Eurafrep Norge A/S, a Norwegian subsidiary of a French company

0.399% Coparex Norge A/S, a Norwegian subsidiary of a French company

0.304% Cofranord A/S, a Norwegian subsidiary of a French company

[8] Deposition of Michael Doyle, at 24-25.

[9] "Bare Boat Charter for Semisubmersible Drilling Vessel 'Alexander L. Kielland' Between Stavanger Drilling II A/S and Phillips Petroleum Company Norway" (Plaintiffs' Exhibit 383) at 4 (emphasis added).

Phillips Norway, as operator of the Kielland, also entered into a "personnel and services" agreement with Stavanger Drilling II A/S. *See* Plaintiffs' Exhibit 383 at 11-24.

possession or command during the term of this Charter, but that Charterer shall have exclusive dominion, control, possession and command of said Vessel during the term of this Charter.

On March 27, 1980, while in the Norwegian sector of the North Sea, the Alexander L. Kielland capsized. Of the 212 men on board when the accident took place, a total of 89 persons were saved. One hundred and twenty-three men died.

Plaintiffs are all individuals or representatives of individuals who were aboard the Kielland when it capsized on March 27, 1980. They maintain causes of action against defendants for negligence under general admiralty and maritime law, the Jones Act, 46 U.S.C. §688, and the Death on the High Seas Act, 46 U.S.C. §761.[10] Plaintiffs' claims against the defendant Phillips are premised on the theory that Phillips Norway is merely the "alter ego" of its parent corporation.[11] In its motion to dismiss, however, Phillips contends that plaintiffs' allegations against the parent corporation fails to state a claim upon which relief can be granted. The Court will therefore first address the question: Do plaintiffs' allegations state a claim against Phillips, the parent corporation?[12]

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[10]The parents of decedent Rolf Arthur Reme have brought an additional cause of action against defendant based on diversity of citizenship, 28 U.S.C. §1332. In their complaint, Case No. C82-31, they allege that the defendants breached a duty of care owed to the parents "to act with care and civil respect in handling of the corpse of the said decedent." Complaint at ¶ 38.

[11]Plaintiffs allege that:

> [Phillips and Phillips Norway] are sufficiently integrated for the subsidiary to be classified legally as a mere agent, instrumentality, adjunct, tool, department or branch of the parent company wherein separation for purposes of this cause of action does not legally lie . . .

Complaint of Estate of Rolf Arthur Reme, Case No. C82-31 at ¶ 9.

[12]Since the court finds that plaintiffs' allegations fail to state a valid claim against Phillips, it need not address the additional grounds in Phillips' motion to dismiss.

II

In their response to Phillips' motion to dismiss, plaintiffs concede: "It is not plaintiffs' intention to attempt to 'pierce the corporate veil' of Phillips Petroleum Company of Norway."[13] Rather, plaintiffs contend that since "a substantial interrelationship exists between the corporate activities of the parent and subsidiary," "the subsidiary can be considered as being the alter ego of the parent corporation."[14] To prove the existence of this "substantial interrelationship" between Phillips and Phillips Norway, plaintiffs have proffered a long list of "Cogent Facts of Evidentiary Proofs." *See:* Plaintiffs' Brief in Opposition to Motion to Dismiss, at 8-50.

Plaintiffs contend that they have established the following facts through discovery:

1. Phillips is organized as a worldwide company.
2. Phillips and its subsidiaries have common officers and directors.
3. Officers and employees are frequently transferred between parent and subsidiaries.
4. Employees of Phillips and its subsidiaries are centrally trained and recruited.
5. Phillips makes engineering, purchasing, and manufacturing decisions for its subsidiaries.
6. Phillips does merchandising and advertising for its subsidiaries.
7. Subsidiaries are under the direct control of, and report to, the top management of Phillips.
8. Phillips and its subsidiaries are consolidated for financial purposes.
9. Phillips guarantees the liabilities of its subsidiaries.
10. Phillips and its subsidiaries share common legal counsel.

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[13] Plaintiffs' Brief in Opposition to Motion to Dismiss, at 62.

[14] *Id.* at 63.

Thus, while denying any attempt to "pierce the corporate veil," plaintiffs nevertheless insist that an interrelationship exists sufficient to treat Phillips Norway as the alter ego of its parent corporation.

In order to hold a parent corporation liable for the acts of its subsidiary, three elements must be provided: (1) control by the parent to such a degree that the subsidiary has become its mere instrumentality or alter ego, (2) fraud or wrongdoing by the parent through its subsidiary (e.g., stripping the subsidiary of its assets or attempting to evade a federal policy or statute);[15] and (3) unjust loss or injury to the claimant, such as insolvency of the subsidiary. *Bucyrus-Erie Co.* v *General Products Corp.*, 643 F.2d 413, 418-19 (6th Cir. 1981); *C M Corp.* v *Oberer Development Co.*, 631 F.2d 536, 538-39 (7th Cir. 1980), *Luckett* v *Bethlehem Steel Corp.*, 618 F.2d 1373, 1378-79 (10th Cir. 1980). *See also: Boggs* v *Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979), *cert. denied*, 444 U.S. 836, 100 S. Ct. 71 (1979); *P. F. Collier & Son Corp* v *FTC*, 427 F.2d 261, 270 (6th Cir. 1970) *cert. denied*, 400 U.S. 926, 91 S. Ct. 188 (1970)[16] In *Boggs* v *Blue Diamond Coal Co, supra*, the Sixth Circuit stated:

> The separate artificial corporate personalities are usually disregarded only when the corporate device is used to defraud creditors, create a monopoly, circumvent a statute or for the other similar reasons. Berle, *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343

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[15] *See* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982)(courts should not hesitate to pierce the corporate veil when a corporate subsidiary is created with the intent to evade a federal policy or statute).

[16] In *P. F. Collier & Son Corp. v. FTC, supra*, the Sixth Circuit held:

> Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute.

427 F.2d at 267 (citations omitted).

(1947); Fuller, *The Incorporated Individual,* 51 Harv. L. Rev. 1373, 1401 (1938).

590 F.2d at 662.

In *Luckett* v *Bethlehem Steel Corp., supra,* the Tenth Circuit held that the parent corporation was entitled to summary judgment in a case similar to the ones currently before this court. The plaintiff, Bill Luckett, was injured while loading equipment onto a drilling rig in Singapore. He then brought suit in the Western District of Oklahoma against Bethlehem Steel and Bethlehem Singapore, a subsidiary of Bethlehem Steel. Although Luckett argued that the parent corporation dominated the decision-making process of the foreign subsidiary, the court stated:

> A court will disregard the corporate entity where fraud or illegal or inequitable conduct is the result of the use of the corporate structures. . . . We do not feel that the possible difficulty of enforcing a judgment against Bethlehem Singapore alone or the possible inconvenience to plaintiff (and resulting convenience to Bethlehem Singapore) in suing Bethlehem Singapore in another forum is the type of injustice which warrants piercing the corporate veil. Hence we hold that Bethlehem Steel is not liable on the theory that Bethlehem Singapore was its mere instrumentality or alter ego.

618 F.2d at 1373.

Furthermore, courts have used this specific standard in cases involving the Jones Act. *See: Williams* v *McAllister Brothers, Inc.,* 534 F.2d 19 (2d Cir. 1976); *Whayne* v *Transportation Management Service, Inc.,* 252 F. Supp. 573 (E.D. Pa. 1966), *aff'd.,* 397 F.2d 287 (3d Cir. 1968), *cert. denied,* 393 U.S. 978, 89 S. Ct. 445 (1968). In *Williams* v *McAllister Brothers, supra,* the court stated:

> To succeed here appellant must successfully advance a two-step argument. First he must prove that PSJT

> [the subsidiary] is a "mere instrumentality" of McAllister [the parent], i.e., that McAllister actually dominates PSJT such that the subsidiary has no existence of its own *and that McAllister uses the corporate existence of PSJT to perpetrate a fraud, resulting in an unjust loss to the claimant.*

534 F.2d at 21 (emphasis added) (citation omitted). Thus, absent a fraud or wrong perpetrated by the parent corporation through its subsidiary *and* an unjust loss or injury to the claimant, a parent corporation cannot be held liable for the acts of its subsidiary.[17].

In the cases currently before the court, plaintiffs fail to allege, first, that Phillips used the corporate existence of Phillips Norway to perpetrate a fraud, and, second, that such fraud has resulted in unjust losses to the claimants. While it may indeed be true that Phillips exerts substantial control over its subsidiaries, such control alone is not sufficient to establish liability. Since plaintiffs do not allege that Phillips created its subsidiary, Phillips Norway, to avoid liability under the Jones Act,[18] and plaintiffs do not allege that Phillips Nor-

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[17] Plaintiffs' reliance upon taxation cases such as *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S. Ct. 2109 (1980), and *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 100 S. Ct. 1223 (1980), is misplaced. These cases simply indicate that a state, for the purpose of taxation, may consider the total increase of wealth that devolves to the parent corporation because of the integration of the business activity of the parent and its subsidiary.

[18] *See* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 868 (1982):

> It is important to distinguish between the situations in which a corporation is used in an attempt to evade a federal policy and those in which it is used merely to take best advantage of legal options available to it. Close business or financial relations between two corporations should not necessarily result in their being held to be a single economic enterprise, and an individual's domination of a close corporation should not in itself vitiate the protection of limited liability. *The true test must be whether the corporation was created for a legitimate business purpose or primarily for evasion of a federal policy or statute.*

(Emphasis added).

way lacks sufficient assets to compensate plaintiffs for its alleged negligence,[19] plaintiffs fail to state a claim against defendant Phillips Petroleum Company. Accordingly, Phillips Petroleum Company's motion to dismiss is granted.[20]

III

As grounds for its motion to dismiss, Phillips Norway asserts that: (1) the court lacks subject matter jurisdiction, (2) process and service of process were insuffficient, (3) the court lacks personal jurisdiction, and (4) dismissal is proper under the doctrine of *forum non conveniens.* The defendant Phillips Norway maintains that the laws of Norway rather than the laws of the United States apply, and that the proper forum for plaintiffs' claims is the City Court in Stavanger, Norway.[21]

Although the Jones Act contains no express limitation on federal subject matter jurisdiction, *see Pure Oil Co.* v *Suarez* 384 U.S. 202, 86 S. Ct. 1394, 1395 (1966), the Supreme Court has twice explored its jurisdictional limits in *Lauritzen* v *Larsen*, 345 U.S. 571, 73 S. Ct. 921 (1953), and *Hellenic Lines*

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[19] Indeed, the evidence adduced thus far seems to suggest that Phillips Norway is a viable corporation with considerable assets. *See, e.g.,* Plaintiffs' Brief in Opposition to Motion to Dismiss, at 41 (indicating that Phillips Norway is in a position to lend Phillips up to $500,000,000).

[20] Fed. R. Civ. P. 12(b) provides in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Since the court finds that the allegations in plaintiffs complaints fail to state a claim upon which relief can be granted, it is unnecessary to consider matters outside the pleadings. However, to the extent that the court made references to matters outside the pleadings, defendants motion may be considered as one for summary judgment.

[21] Defendants' Trial Brief in Support of Motion to Dismiss, at 16-35.

Ltd. v *Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731 (1970). In *Lauritzen*, Justice Jackson set out seven factors for a court to consider in determining whether it has subject matter jurisdiction under the Jones Act: (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured, (4) the allegiance of the defendant shipowner, (5) the place of contract, (6) the inaccessibility of a foreign forum, and (7) the law of the forum. 345 U.S. at 583-91, 73 S. Ct. at 928-32. In *Rhoditis*, Justice Douglas added an eighth factor — "the shipowner's base of operations." 398 U.S. at 309, 90 S. Ct. at 1734. Moreover, in *Rhoditis*, the Supreme Court expressly adopted the test enunciated by Judge Medina in *Bartholomew* v *Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U.S. 1000, 79 S. Ct. 1138 (1959), that the substantiality of the contacts between the transaction involved and the United States be determined on an absolute scale and not by comparing or balancing the presence of certain contacts with the absence of others. *Rhoditis, supra*, 398 U.S. at 308-10 & n. 4, 90 S. Ct. at 1734-35 & n.4. *Moncada* v *Lemuria Shipping Corp.*, 491 F.2d 470 (2d Cir. 1974), *cert. denied*, 417 U.S. 947, 94 S. Ct. 3072 (1974).

Plaintiffs submit that, in applying the *Lauritzen-Rhoditis* factors to the cases currently before the court, this court must conclude that subject matter jurisdiction exists under the Jones Act. Plaintiffs rely upon the following contacts between the capsizing of the Kielland and the United States: (1) the charterer, Phillips Norway, is a Delaware corporation,[22] (2) this is an American forum, (3) the charterer's base of opera-

[22] "Generally, as to injured seamen [a bare boat] charterer steps into the shoes of the shipowner. *Reed v. The Yaka*, 373 U.S. 410, 83 S. Ct. 1349 (1963)." *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir. 1969). Moreover, in *Reed v. The Yaka*, the Supreme Court stated: "[A] bareboat charterer and operator of a ship [is] charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid." 373 U.S. at 415, 83 S. Ct. at 1353.

tions is in Bartlesville, Oklahoma,[23] and (4) at least one of the plaintiffs is a United States citizen.[24] Plaintiffs further contend that these contacts are at least as substantial as the contacts in other cases where courts have found subject matter jurisdiction under the Jones Act. *e.g. Hellenic Lines Ltd.* v *Rhoditis, supra; Antypas* v *Cia Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied,* 129 U.S. 1098, 97 S. Ct. 1116 (1977); *Moncada* v *Lemuria Shipping Corp., supra.*[25] Cer-

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[23] Defendants contend that Phillips Norway's base of operations is in Norway; however, it is uncontroverted that the Board of Directors meetings of Phillips Norway are held in Bartlesville, Oklahoma. Answer to Defendants' Request for Admissions, at 16. Furthermore, although Phillips Norway has a "Norwegian Branch" which conducts all of the company's operations in Norway, *see* Phillips Petroleum Company Norway, Norwegian Branch, Annual Accounts 1980 (Plaintiffs' Exhibit 388) at 15, the testimony presented at the preliminary hearing and the evidence received suggest that the ultimate decisionmaking for Phillips Norway originates in Bartlesville, Oklahoma.

[24] *See* Complaint of Estate of Rolf Arthur Reme, Case No. C82-31 at ¶ 6. Defendants dispute Reme's United States citizenship.

[25] *But see, e.g., Volyrakis v. M/V ISABELLE,* 668 F.2d 863 (5th Cir. 1982); *Chiazor v. Transworld Drilling Co.,* 648 F.2d 1015 (5th Cir. 1981), *cert. denied,* U.S. , 102 S. Ct. 1714 (1982); *Phillips v. Amoco Trinidad Oil Co.,* 632 F.2d 82 (9th Cir. 1980), *cert. denied,* 451 U.S. 920, 101 S. Ct. 1999 (1981); *Chirinos de Alvarez v. Creole Petroleum Corp.,* 613 F.2d 1240 (3d Cir. 1980); *DeMateos v. Texaco, Inc.,* 562 F.2d 895 (3d Cir. 1977), *cert. denied,* 435 U.S. 904, 98 S. Ct. 1449 (1978).

In *Hellenic Lines Ltd. v. Rhoditis, supra,* the Supreme Court expressly adopted the language of the Second Circuit's opinion in *Bartholomew v. Universe Tankships Inc., supra:*

Judge Medina speaking for the Court of Appeals for the Second Circuit, correctly stated the problem in the following words:

> "[T]he decisional process of arriving at a conclusion on the subject of the application of the Jones Act involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial. Thus each factor is to be 'weighed' and 'evaluated' only to the end that, after each factor has been given consideration, a rational and satisfactory conclusion may be arrived at on the question of whether all the factors present add up to the necessary substantiality. *Moreover, each factor, or con-*

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tainly, as to the claims of any United States citizens aboard the Kielland, this court has subject matter jurisdiction under the Jones Act.[26] And while the court believes that it has subject matter jurisdiction to hear the claims of *all* persons aboard the Kielland, such a determination is unnecessary, since the court finds that it lacks personal jurisdiction over the defendant Phillips Norway.

In order for a federal court to have personal jurisdiction over a nonresident defendant, the court must find that the long-arm statute of the forum state provides for jurisdiction in the context under scrutiny and that the contacts of the defendant with the forum state are sufficient so as not to offend due

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tact, or group of facts must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act." Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 441.

398 U.S. at 309 n.4, 90 S. Ct. at 173 n.4. (Emphasis added). The opinions of the other circuits cited above have apparently rejected the express language of the Supreme Court's holding in *Rhoditis* in favor of the Supreme Court's earlier holding in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921 (1953).

This court agrees with the Second Circuit, which stated in *Moncada v. Lemuria Shipping Corp., supra:*

> No subsequent decision of this court or of the Supreme Court has undercut the holding of *Bartholomew*. Indeed, in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 n.4, 90 S. Ct. 1731, 26 L.Ed.2d 252 (1970), the Supreme Court expressly adopted the test enunciated by Judge Medina in *Bartholomew*. Whether, as appellee suggests, the dissent in *Rhoditis* might now win the support of a majority of the Supreme Court is not for us to decide.

491 F.2d at 492.

[26] *See: Farmer v. Standard Dredging Corp.*, 167 F. Supp. 381, 383 (D. Del. 1958):

> [I]f any other factor can be combined with the United States citizenship or domicile of the seaman which will serve as a basis for applying the law of the United States, the law of the flag will be discarded if its application would defeat an action under the Jones Act.

(Footnote omitted). Furthermore, under *Rhodities, Bartholomew*, and *Moncada*, the substantiality of contacts is "to be determined on an asolute scale and not by comparing or balancing the presence of certain contacts with the absence of others." *Moncada v. Lemuria Shipping Corp.*, 491 F.2d at 472.

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process. *See: Rush* v *Savchuk,* 444 U.S. 320, 100 S. Ct. 571 (1980); *World-Wide Volkswagen Corp* v *Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980); *Kulko* v *Superior Court*, 436 U.S. 84, 98 S. Ct. 1690 (1978); *Hanson* v *Denckla*, 357 U.S. 235, 78 S. Ct. 1228 (1957); *International Shoe Co* v *Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945). Since the Ohio long-arm statute, OHIO REV. CODE ANN. §2307.382 (Page 1976),[27] has been held to extend the jurisdiction of Ohio courts over nonresident defendants to the limits established by the United States Constitution, *In-Flight Devices Corp* v *Van Dusen Air, Inc.,* 466 F.2d 220 (6th Cir. 1972), the only question presented to the court is whether Phillips Norway has sufficient contacts with Ohio to satisfy the constitutional requirement of "minimal contact with the forum state." *See: e.g., International Shoe Co* v *Washington, supra*, 326 U.S. at 316, 66 S. Ct. at 158; *Shaffer* v *Heitner,* 433 U.S. 186, 97 S. Ct. 2569 (1977); *McGee* v *International Life Insurance Co.,* 355 U.S. 220, 78 S. Ct. 199 (1957). "The burden of establishing jurisdiction is on the plaintiff." *Welsh* v *Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980) *cert. denied*, 450 U.S. 981, 101 S. Ct. 1517 (1981).

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[27] OHIO REV. CODE ANN. §2307.382 (Page 1976) provides as follows:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) *Transacting any business in this state;*

*(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or service rendered in this state;

(6) Causing tortious injury in this state to any person by an act

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In the cases currently before the court, plaintiffs concede that Phillips Norway "does not do business in the Northern District of Ohio;"[28] however, they contend that since this court has personal jurisdiction over Phillips, the parent corporation, it should also have personal jurisdiction over Phillips Norway.[29]

Although the Sixth Circuit has never considered the issue of jurisdiction over a foreign *subsidiary* whose *parent corporation* carries on local activities, it has considered the issue of personal jurisdiction over a foreign *parent corporation* whose *subsidiary* carries on local activities. *See: Velandra* v *Regie Nationale des Usines Renault,* 336 F.2d 292 (6th Cir. 1964). In *Velandra*, the plaintiff was injured in an automobile accident in Michigan and sued the manufacturer of the automobile, Regie Nationale des Usines Renault (Regie), a French corporation, and the importer, Renault, Inc. (Renault), a New York corporation. Plaintiff did not sue the regional distributor, Renault Great Lakes, Inc., a wholly-owned subsidiary of Renault, which carried on substantial activities in Michigan.

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outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity [;]

*(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

(Emphasis added).

Personal jurisdiction over Phillips Norway for the cause of action alleging negligent infliction of emotional distress in Case No. C82-31 is governed by §2307.382(A)(4). *See* note 10, *supra.* Since this subsection also requires that a defendant do business in Ohio, the jurisdictional issue is the same.

[28] Answer to Defendants' Request for Admissions, at 15.

[29] Plaintiffs' Brief in Opposition to Motion to Dismiss, at 78-83.

336 F.2d at 295-96. The Sixth Circuit held that the presence of this wholly-owned subsidiary corporation doing business within the state was not a sufficient contact to permit the exercise of personal jurisdiction over the manufacturer (Regie) and the importer (Renault). The court stated:

> Following [*International Shoe*] it would seem appropriate, for the purpose of determining the amenability to jurisdiction of a foreign corporation which happens to own a subsidiary corporation carrying on local activities, to inquire whether the parent has the requisite minimum contacts with the State of the forum. *Thus the ownership of the subsidiary carrying on local activities in Michigan represents merely one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts with the State of Michigan, but is not sufficient of itself to hold the present foreign corporations amenable to personal jurisdiction.*

336 F.2d at 297 (emphasis added) (footnote omitted). *Accord, In Flight Devices Corp.* v *Van Dusen Air, Inc.*, 466 F.2d 220, n. 26 (6th Cir. 1972); *Southern Machine Co.* v *Mohasco Industries, Inc.*, 401 F.2d 374, 383 N. 25 (6th Cir. 1968).[30] Thus, *so long as the separation of the parent corporation from the commerce of the state is real and not merely superficial,* the parent will be insulated from the *in personam* reach of the state's courts. *In Flight Devices, supra,* 466 F.2d at 235 n. 26, *Mohasco, supra,* 401 F.2d at 383 n. 25.

In *Blount* v *Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695 (2d Cir. 1963), *cert. denied*, 375 U.S. 831, 84 S. Ct. 76 (1963), the Second Circuit considered a case similar to the ones currently

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[30] *See also Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S. Ct. 250 (1925). In an opinion by Justice Brandeis, the Supreme Court held that the presence of a local subsidiary did not establish jurisdiction over the parent corporation. "The corporate separation, though perhaps merely formal, was real." 267 U.S. at 337, 45 S. Ct. at 251.

before the court. In *Blount*, the plaintiffs, all Baltimore longshoremen, were allegedly injured when chlorine gas escaped from cylinders owned and shipped by Peerless Chemicals (P.R.) Inc., a Puerto Rican corporation and wholly-owned subsidiary of Peerless Oil and Chemical Corp., a New York corporation. Plaintiffs filed their complaint in the Eastern District of New York. Judge Dooling ruled that the court lacked personal jurisdiction over the Puerto Rican subsidiary, and the Second Circuit affirmed. The Second Circuit held that the parent corporation's presence in New York did not establish jurisdiction over the parent's wholly-owned foreign subsidiary.[31]

In *Walker* v *Neugent*, 583 F.2d 163 (5th Cir. 1978) *cert. denied*, 441 U.S. 906, 99 S. Ct. 1994 (1979), the Fifth Circuit also refused to find personal jurisdiction over a foreign subsidiary whose parent corporation was doing business within the jurisdiction. The facts in *Walker* are strikingly similar to those in the cases currently before this court. In 1970, Walker was severely injured in an automobile accident while stationed

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[31] The distinction that the Second Circuit draws between asserting jurisdiction over foreign *subsidiaries* as opposed to foreign *parent companies* is of particular interest. In *Blount*, the Second Circuit stated that the reasons for asserting jurisdiction over the parent of a local subsidiary do not apply to the converse situation of asserting jurisdiction over the subsidiary of a local parent corporation.

> First, the parent's control over the subsidiary may be such that it is deriving considerable profit from the subsidiary's activities within the forum state; as we have already noted, the state's extension of protection to those activities may render it fair and reasonable that the parent submit to jurisdiction there. Second, control over the subsidiary and its personnel and records in the forum state may render it convenient for the parent to defend there. Jurisdiction over the parent therefore becomes unfair to the extent that the independence of the local subsidiary is a reality. See Note, 104 U. of Pa.L.Rev. at 403-06, and the cases there discussed. In the converse situation, which we have before us, Peerless (P.R.) is so much an effectively independent corporate entity — certainly not in a position conveniently to defend an action here — that to subject it to judicial process in the state of New York under the circumstances of this case would be to impose an unconstitutional burden.

316 F.2d at 699.

with the United States Armed Forces in Germany. In 1973, he filed a complaint in the Southern District of Texas against (1) the driver, (2) General Motors Corp., and (3) Adam Opel AG (Opel), a German corporation and wholly-owned subsidiary of General Motors. The automobile in question was designed, manufactured, and sold by Opel. The district court granted General Motors' motion for summary judgment and dismissed Opel for lack of personal jurisdiction. 583 F.2d at 165.[32] The Fifth Circuit affirmed the district court's dismissal of Opel, concluding: "[P]laintiff has not presented evidence establishing such a degree of control by General Motors over Opel as to permit imputing the business done in Texas by GM to its subsidiary Opel." 583 F.2d at 167.

As stated earlier, the burden of establishing jurisdiction is on the plaintiffs. *Welsh* v *Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980, *cert. denied*, 450 U.S. 981, 101 S. Ct. 1517 (1981). From the Sixth Circuit's opinion in *Velandra* v *Regie Nationale des Usines Renault, supra*, it is clear that in order for this court to have jurisdiction over Phillips Norway, plaintiffs must prove by a preponderance of the evidence, *see Welsh* v *Gibbs, supra*, 631 F.2d at 439, that Phillips Norway's separation from the commerce of Ohio is merely superficial. Plaintiffs, however, admit that Phillips Norway does no business in the Northern District of Ohio[33] and offer no evidence of any activity by Phillips Norway within Ohio.[34] Furthermore, since plaintiffs

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[32] General Motors moved for summary judgment on the grounds that (1) it did not design, manufacture or sell the automobile in question, and (2) there was no ground for disregarding the separate corporate existence of Opel, as the district court had already held when it granted Opel's motion to dismiss. 583 F.2d at 165.

[33] Answer to Defendants' Request for Admissions, at 15.

[34] In determining whether sufficient minimum contacts exist to permit a court to exercise personal jurisdiction over a defendant the Court of Appeals for the Sixth Circuit has held that the following "three-fold" analysis should apply:

> First, the defendant must purposefully avail himself of the privi-

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concede that "piercing the corporate veil" is not at issue, the court finds no reason to impute the business done in Ohio by Phillips to its subsidiary, Phillips Norway. As Justice Brandeis stated in *Cannon Manufacturing Company* v *Cudahy Packing Co., supra*, "The corporate separation, though perhaps merely formal, was real." 267 U.S. at 337, 45 S. Ct. at 251.[35] Since this court finds that it lacks personal jurisdiction over the defendant Phillips Petroleum Company Norway, Phillips Petroleum Company Norway's motion to dismiss is granted.

Accordingly, defendants' motions to dismiss are granted.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

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lege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

In-Flight Devices Corp. v. Van Dusen Air, Inc., supra, 466 F.2d at 226. *See also: Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). Plaintiffs have offered no evidence that Phillips Norway purposefully availed itself of the privilege of acting in Ohio, that these actions arose from Phillips Norway's activities in Ohio, or that Phillips Norway has a substantial enough connection with Ohio to make the exercise of jurisdiction over it reasonable.

[35] Indeed, "plaintiffs recognize that under the corporate laws of Delaware, Phillips Petroleum Company Norway is a separate legal entity from its parent corporation." Plaintiffs' Brief In Opposition to Motion to Dismiss, at 62. While it may be true that Phillips exerts substantial control over its subsidiary, Phillips Norway, such control alone is not sufficient to impute the business done in Ohio by Phillips to Phillips Norway. Were there no jurisdiction in which Phillips Norway was amenable to suit, plaintiffs might have a better argument for imputing the business done in Ohio by Phillips to Phillips Norway; however, it is unquestioned that courts in both Delaware and Oklahoma could assert personal jurisdiction over Phillips Norway.

Title of Court and Cause

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned cases, defendants' motions to dismiss are granted.

IT IS SO ORDERED.

JOHN M. MANOS
UNITED STATES DISTRICT JUDGE

No. 83-3206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALL ALEXANDER L. KIELLAND LITIGANTS,
Plaintiffs-Appellants,
v.
PHILLIPS PETROLEUM COMPANY, INC.,
Defendant,
PHILLIPS PETROLEUM COMPANY NORWAY, INC., Jointly and Severally,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
(Filed Sept. 17, 1984)

BEFORE: KEITH and JONES, Circuit Judges; and BALLANTINE, District Judge.*

Per Curiam. The plaintiffs appeal from the district court's order dismissing their claims under the Jones Act, 46 U.S.C. §688, and the Death on the High Seas Act, 46 U.S.C. §761, *et seq.*, against Phillips Petroleum Company of Norway ("Phillips Norway"). Upon consideration of the issues presented by this appeal we affirm the order of the district court.

The Phillips Petroleum Company, Inc. ("Phillips"), a defendant below, is a Delaware corporation with its principal place of business in Oklahoma. Phillips and its subsidiaries are engaged in petroleum exploration and production on a worldwide basis. Phillips sells products in all fifty states and in about ninety countries. Phillips is not a party to this appeal.

Phillips Norway, the defendant-appellee, is also a Delaware

*Honorable Thomas A. Ballantine, United States District Court for the Western District of Kentucky, sitting by designation.

corporation and, at the time of the accident, was a wholly owned subsidiary of Phillips. Phillips Norway and several co-venturers own a license issued by the Kingdom of Norway which covers a very important petroleum operation in the Norwegian North Sea. Phillips Norway operates this field, known as the Greater Ekofisk Development, and sells all of its oil to Phillips. The Ekofisk operations accounted for approximately 30% of Phillips' total energy production in 1981.

On July 15, 1976, Phillips Norway entered into a Bare Boat Charter agreement with Stavenger Drilling II A/S, a Norwegian corporation. Pursuant to this agreement Phillips Norway took the Kielland, a semi-submersible drilling rig owned by Stavenger, under bare boat charter. The charter provided that Phillips Norway would use the Kielland, a Norwegian flag vessel, as an accommodation platform in connection with its oil and gas operations in the North Sea. Phillips Norway also assumed exclusive dominion and control of the Kielland during the term of the charter.

On March 27, 1980, the Kielland capsized in the Norwegian sector of the North Sea. There were 212 men on board at the time, 123 of whom died.

The survivors and the representatives of those who did not survive filed actions in the Northern District of Ohio against Phillips and Phillips Norway under the Jones Act and the Death on the High Seas Act. The claims against Phillips were brought on the theory that Phillips Norway was the alter ego of its parent corporation. Phillips moved to dismiss the claim against it on grounds of 1) the failure to state a claim; 2) the lack of subject matter jurisdiction and 3) lack of personal jurisdiction; and 4) forum non conveniens. Following limited discovery and a hearing the district granted both motions finding that the plaintiffs had failed to state a claim against Phillips and that it lacked personal jurisdiction over Phillips Norway. The plaintiffs appeal only the dismissal of the claim against Phillips Norway.

The plaintiffs assert that the district court committed three

errors of law in dismissing Phillips Norway for lack of personal jurisdiction. First they assert that the district court erred in applying the minimum contacts test of the Fourteenth Amendment because their action arose under federal law. Thus, they contend that jurisdiction should be determined under the Fifth Amendment.

Second, plaintiffs argue that the court erred in requiring them to show that Phillips Norway conducted business in the forum state since Phillips Norway and Phillips were part of a single integrated business enterprise. They concede that Phillips Norway does no business in Ohio.

Finally, they argue that the district court erroneously required them to pierce the corporate veil in order to establish personal jurisdiction the plaintiff over Phillips Norway.

On a motion to dismiss for lack of jurisdiction the plaintiff has the burden of establishing both personam and subject matter jurisdiction. *McNutt* v *General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Welsh* v *Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980). The court must consider pleadings and affidavits in the light most favorable to the plaintiffs. *Freeman* v *Gordon & Breach Science Publishers, Inc.*, 398 F. Supp. 519 (S.D.N.Y. 1975). Where the district court has held a hearing, the plaintiff must establish jurisdiction by a preponderance of the evidence. *Welsh, supra*, at 439.

After considering the arguments presented by the parties we conclude that the district court did not err in dismissing the claim against Phillips Norway for lack of personal jurisdiction. Accordingly, the district court's order is hereby AFFIRMED.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By:
Deputy Clerk
ISSUED AS MANDATE: December 13, 1984
COSTS: None

(Title of Court and Cause)

(Filed Dec. 5, 1984)

ORDER

BEFORE: KEITH and JONES, Circuit Judges; and BALLANTINE, District Judge.*

The Court received a petition for rehearing en banc which was circulated not only to the original panel members but also to all other active judges of this Court. No judge of this Court has requested a vote on the suggestion for rehearing en banc, whereupon, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

The panel would like to further clarify its opinion by adding the following language before the last sentence on page three:

> The case does not hinge upon an application of a Fifth versus a Fourteenth Amendment due process approach as suggested by the appellants. This case hinges upon a line of cases that held if a subsidiary is tantamount to a mere department or division of the parent, then the subsidiary and the parent are treated as one for jurisdictional purposes. *See Cannon Manufacturing Co.* v *Cudahy Packing Co.*, 267 U.S. 333 (1925); *Hargrave* v *Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983); *Walker* v *Newgent*, 583 F.2d 163, 167 (5th Cir. 1978), *cert. denied,* 441 U.S. 906 (1979); *Velandra* v *Regie Nationale des Usines Renault*, 336 F.2d 292 (6th Cir. 1964); *Blount* v *Peerless Chemicals, Inc.*, 316 F.2d 695 (2d Cir.), *cert. denied,* 375 U.S. 831 (1963).
>
> The district court carefully examined the nature of this parent-subsidiary relationship and concluded that plaintiffs had not met their burden of showing that the

activities of the parent and subsidiary are so closely interconnected that the acts of one could be said to be the acts of the other. The district court found that Phillips Petroleum and Phillips Norway were not sufficiently integrated to be considered one entity for jurisdictional purposes. This finding was not clearly erroneous. Consequently, service on Phillips Petroleum did not operate as service on Phillips Norway.

ENTERED BY ORDER OF THE COURT

/s/ JOHN HEHMAN
Clerk

PARTIES PLAINTIFF (PETITIONERS)

The plaintiffs in these actions are in one of three classes. Seventy-two plaintiffs are survivors of the Kielland disaster who have sued in their own names. Actions on behalf of sixty-seven decedents have been filed in the name of the Estate of the decedent by its Administrator, Creighton E. Miller. The bodies of twenty-eight seaman have never been found and they are presumed dead. Actions on behalf of the presumed deceased have been filed in the name of the Estate by its Administrator and by the next of kin in their own names. The names of the plaintiff litigants are as follows:

SURVIVORS

Leif Wiig Abrahamsen
Ronald F. Deane
Oddvar Engelsgjerd
Bengt Hammer
Ole J. Hestvik
Finn Kolsto
Harry Oddvar Lovo
Thore Olsen
Jaroslav Pinos
Tony Sylvester
Vegard Vermundsen
John Aird
Bjorn Bentsen
William Edward Brooking
Thorlief Endresen
Karl-kr Eriksen
Funrald Falk
Ola Gaustad
Otto Grinde
Harold B. Hansen
Malvin Hauge
Dag Jarle Jenssen
Trygve Borsheim
Kare Eide
William Graham
Peter Head
Jahn Otto Johnsen
Oddbjorn Lærbrekk
Per Mangseth
Frank Pedersen
Kare Svendsboe
Alf Taraldlien
Geir Vestre
Jarle Andreassen
Bengt Berheim
Eivind Egeli
Helge Eneberg
Gunnar Fabermo
Frank Einar Fredriksen
Castor Gonzales
Bjorn-Einar Hansen
Hakon Jarl Hansen
Anders Helliksen
Sigve Klungland

Helge Knutsen
Kare Magne Kvale
Age Lund
Johannes Mundheim
John Arild Nilssen
Rolf Olavssen
Tor Yngve Olsen
Gunnar Ovrebo
Francisco Martinez Santos
Magne Sildelid
Adolf Sundt
Finn Bakke Thorsen
Svein H. Vik
Trond Erik Pettersen
Kjell Johan Kulleseid
Terence Lister
Edmund Mongstad
Leif Mykland
Svein Ragnuald Ofte
Oskar Olsen
Odd Osland
Paul Trygve Roysland
Reidar Gudmund Selvig
Gerry Atle Stigen
Alf Soderlund
Jan Vestre
Gunnar Vintland

DECEDENTS

Estates of:
Knut Amundsen
Lothar Apostel
Tor Austbo
Magne Birkeland
Arne Jorgen Eggen
Gunrald Folgersen
Ingelbrigt Glarium
Wilhelm Gjerde
Odd Hansen
Terje Kristoffersen Hanssen
Ernst Rafael Hedman
Per Bjarne Hofstad
Kare Marthon Jess
Steinar Johansen
Arnt Egil Korsnes
Knut Kulia
Edward Laxon
Erik Leknes
Johnny Mauland
Tommy Anderson
Kare Tarald Augland
Karstien Berland
Terje Egeland
Michael Fleming
Einar Adolf Gaulen
Brian Graham
Jan Geir Hansen
Svein Steinar Hansen
Ivar Joachim Haegeland
Jan Heintz
Lars-Johan Iversen
Otto Johanssen
Arne Th. Jorgensen
Odd Sigmund Krako
Louis Larsen
Marku Jlmari Lehtinen
Rolf Lervik
John McGrady

Bjarne Melkevik
Sven Harald Moseid
Tor Oisang
Ivar Alfred Olsen
Paul Paulsen
Tore Pedersen
Vidar Skjervoy
Odd Einar Stumo
John J. Tegowski
Age Thoresen
Ivar Traa
Aflred Vassnes
Bjorn Olsen
Tom Prior
Lars Hansen
Egil Morcer
Odd Kjell Nilsen
Arne Magnus Olsen
Karl Erik Ostvedt
Age Pedersen
James Edward Poulter
Tom Arne Skomedal
Tarstin Saed
Paul Ian Thomas
Gunnar Torsteinbu
Jostein Vaagsbo
Svein Magne Vikan
Tor Age Kolbeinsen
Rolf Arthur Reme

PRESUMED DECEDENTS AND NEXT OF KIN

Estate of Arild Didriksen; Evelyn Didriksen
Estate of Ivar Ellingsen; Christine Ellingsen
Estate of Eivind Falkum; Anne-Lise Falkum
Estate of Kjell Hagen; Hjordis Hagen
Estate of Laszlo Hajek, Jr.; Maria Hajek
Estate of John Michael Harris; Magdalene Harris
Estate of Keith Hunter; Jacqueline Bonavan
Estate of Arvid M. Johansen; Ingun Johansen
Estate of Leif Bjarne Johansen; Jan Johansen
Estate of Oyvind Johansen; Gudrun Johansen
Estate of Rolf Henrik Martinssen; Aminda Martinssen
Estate of Svein Ove Olsen; Bjorg Olsen
Estate of John Richard Phillips; Leonard Phillips
Estate of George Christopher Purcell; Joyce Purcell
Estate of Svein Ramsdal; Ellen Ramsdal
Estate of Leif O. Reve; Tordis Reve
Estate of John Richardson; N. Richardson
Estate of Kjell Arne Schonning; Agnes Schonning, Knut Schonning, and Else Klubben

Estate of Oyvind Anders Salhus; Ovavg Salhus and Anders Salhus
Estate of Bjorn Skaanes; Eva F. Skaanes
Estate of John Agnar Skogoy; Kirsten Skogoy
Estate of Magnar Saebo; Gerd Anny Saebo
Estate of Arne Thomassen; Marianne Thomassen
Estate of Laire Viken; Martha Viken
Estate of John Ivar Waale; Gerd Waale
Estate of Odd Bjorn Wiberg; Ase Wiberg
Estate of Bjorn Einar Winge; Marit Winge
Estate of Joar Asbjorn Dyrstad; Marit Dyrstad Ektefelle

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FILED
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ALEXANDER L. STEVA
CLERK

No. 84-1460

In The

Supreme Court of the United States

October Term, 1984

ALL ALEXANDER L. KIELLAND LITIGANTS,

Petitioners,

v.

PHILLIPS PETROLEUM COMPANY NORWAY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PHILLIPS PETROLEUM COMPANY NORWAY IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Sixth Circuit err in affirming per curiam the District Court's dismissal of Petitioners' claims against Phillips Petroleum Company Norway ("Phillips Norway") for lack of in personam jurisdiction where Petitioners attempted to effect service on Phillips Norway only by serving its parent, and Phillips Norway and its parent were determined, as a factual matter, to be separate and distinct entities for purposes of jurisdiction and service?

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In The

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October Term, 1984

No. 84-1460

ALL ALEXANDER L. KIELLAND LITIGANTS,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY NORWAY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PHILLIPS PETROLEUM COMPANY NORWAY IN OPPOSITION

Respondent prays that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The personal injury claims asserted below against Phillips Petroleum Company Norway ("Phillips Norway") arose from the capsizing of the Alexander L. Kielland (the "Kielland") in the Norwegian sector of the North Sea. That incident had no connection whatsoever with Ohio, where petitioners' counsel chose to file the claims at issue. The Kielland was a Norwegian flag vessel registered in Norway.

It was owned by Stavanger Drilling II A/S of Stavanger, Norway, a business entity organized and existing in Norway under the laws of Norway, and was under bareboat charter to Phillips Norway on behalf of itself and its eight European co-venturers. The Kielland was never in United States territorial waters. It was designed and constructed in France by French companies. The crew was provided by Stavanger Drilling pursuant to an agreement which was entered into in Norway and is subject to the laws of Norway. The official investigations of the accident were conducted by the Norwegian government and the Stavanger, Norway, Police.[1]

All 212 persons on board the Kielland when it capsized were permanent residents of countries other than the United States. No evidence was offered at the lengthy hearing conducted by the district court that any of the petitioners had any connection with Ohio.[2] Their claims could all be heard in Norwegian courts which, unlike the court selected by petitioners' counsel, are properly positioned to adjudicate such disputes. In addition, over 200 of the 212 Kielland claimants have accepted settlement payments and executed general releases in Norway or countries other than the United States.

Like the accident itself, Phillips Norway has no connection with Ohio. It is a Delaware corporation which does not do business in Ohio and has no office, employees or agents (for service of process or otherwise) in that state. Petitioners therefore attempted to effect service upon

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[1] The persons who conducted those investigations and the witnesses interviewed, as well as the owner, designers and builders of the Kielland, are all beyond the subpoena power of the District Court for the Northern District of Ohio.

[2] Petitioners' assertion at page two, note two of the Petition for Writ of Certiorari (the "Petition") that claimant Rolf Arthur Reme was a resident of the northern district of Ohio is unsupported by the record.

Phillips Norway by delivering summonses and complaints to an Ohio office of Phillips Petroleum Company ("Phillips Petroleum"), its parent corporation, apparently on the theory that the two corporations should be considered one and the same entity for purposes of service and jurisdiction.

After an extensive four-day evidentiary hearing, the district court found that Phillips Petroleum and Phillips Norway could not be so considered. That finding was supported by evidence that, among other things, the day-to-day operations of Phillips Norway are conducted exclusively in Norway; its assets, financial operations, accounting records and corporate affairs are independent of those of Phillips Petroleum; there is no director of Phillips Norway who is also a director of Phillips Petroleum; Phillips Norway pays its own income taxes to the Kingdom of Norway; there has been no commingling of funds, property or assets of the two corporations; Phillips Petroleum's purchases of oil from Phillips Norway have been at competitive commercial rates; loans between the two companies have been repaid, with interest at competitive commercial rates; and Phillips Norway operates with its own capital and is a viable corporation with considerable assets.

The district court's holding that jurisdiction over Phillips Norway could not be acquired through Phillips Petroleum was affirmed per curiam on appeal. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, arguing principally that the dismissal and affirmance were based on a misapplication of due process requirements and a misunderstanding of the circumstances under which jurisdiction could be acquired in Ohio over a nonresident subsidiary through its parent. That petition was denied. None of the judges of the Sixth Circuit even requested a vote on the suggestion for rehearing en banc, and the original hearing panel was satisfied that "the issues raised in the petition were fully considered upon the original submission." Order of the Sixth Circuit of

December 5, 1984 ("the Sixth Circuit Order"), at Appendix 24A-25A.[3]

The Sixth Circuit Order both announced the denial of the petition for rehearing and supplemented the Sixth Circuit's initial opinion of September 17, 1984. The Sixth Circuit Order expressly approved the lower court's findings that the two corporations "were not sufficiently integrated to be considered one entity for jurisdictional purposes" and that the activities of the parent and subsidiary had not been proven to be "so closely interconnected that the acts of one could be said to be the acts of the other." Sixth Circuit Order at Appendix 25A. Given those findings, the Sixth Circuit concluded that "service on Phillips Petroleum did not operate as service on Phillips Norway." *Id.*[4]

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISIONS BELOW WERE BASED ON FACTUAL FINDINGS WHICH DO NOT WARRANT REVIEW BY THIS COURT

The district court's dismissal of petitioners' claims against Phillips Norway, and the Sixth Circuit's affirmance of that dismissal, were grounded wholly in the facts of this case. In an effort to create adequate grounds for the granting of a writ of certiorari, petitioners attempt to imbue this case with constitutional significance. But there is no constitutional issue before this Court. Petitioners also attempt to manufacture a conflict among the federal courts, but no

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[3] The opinions and orders of the courts below are reproduced in the Appendix to the Petition (the "Appendix") and are cited by reference thereto.

[4] Neither the initial opinion of September 17, 1984 nor the subsequent supplementation of December 5, 1984 was recommended for full-text publication.

such conflict exists. The disposition of this case did not turn on the application of constitutional law or an unsettled legal principle but simply upon factual findings with which petitioners disagree.

On the facts, both the district court and Sixth Circuit concluded that the contacts of Phillips Petroleum with the State of Ohio could not be attributed to Phillips Norway. Since Phillips Norway itself had no contact whatsoever with petitioners' chosen forum, service of process could not be effected on nor in personam jurisdiction exercised over Phillips Norway. Petitioners now seek further reconsideration of the factual findings on which the resulting dismissal and affirmance were based, but it has not been and should not be the practice of this Court to grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioners have not and cannot show "special and important reasons" for the grant of the requested writ. *See* Sup. Ct. R. 17.1.

A. There Is No Constitutional Issue Before This Court.

To pique the interest of this Court, petitioners initially posit for review a "constitutional" question concerning the due process limits of in personam jurisdiction. Petitioners claim that this case turns on whether the jurisdictional inquiry in admiralty actions should focus on the defendant's "aggregate contacts" with the United States as a whole (petitioners' "Fifth Amendment standard") or on its contacts with the selected forum (petitioners' "Fourteenth Amendment standard"). Petition at 10-13.

Petitioners' question is purely hypothetical— this case did not turn on any constitutional determination. As the Sixth Circuit explained:

> *The case does not hinge upon an application of a Fifth versus a Fourteenth Amendment due process*

> *approach as suggested by the appellants*. This case hinges upon a line of cases that held if a subsidiary is tantamount to a mere department or division of the parent, then the subsidiary and the parent are treated as one for jurisdictional purposes. [Citations omitted.]
>
> *The district court carefully examined the nature of this parent-subsidiary relationship* and concluded that the plaintiffs had not met their burden of showing that the activities of the parent and subsidiary are so closely interconnected that the acts of one could be said to be the acts of the other. The district court found that Phillips Petroleum and Phillips Norway were not sufficiently integrated to be considered one entity for juris'':tional purposes . . . . Consequently, service on Phillips Petroleum did not operate as service on Phillips Norway. [Sixth Circuit Order at Appendix 24A-25A (emphasis supplied).][5]

Since Phillips Petroleum and Phillips Norway were properly found to be separate and distinct entities for jurisdictional purposes, petitioners' service on Phillips Petroleum did not constitute service on Phillips Norway. The Sixth Circuit's affirmance was not based on any issue of jurisdictional due process, but on the factual nature of the relationship between the two corporations and the resulting failure of service. Petitioners' rhetoric cannot create a constitutional issue where none existed or exists.

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[5] While petitioners quote most of the substantive portions of the Sixth Circuit Order in their Statement of the Case, the omissions are most telling. Petitioners delete both the Sixth Circuit's conclusion that this case "does not hinge upon an application of a Fifth versus a Fourteenth Amendment due process approach" and its finding that the district court "carefully examined the nature of [the] parent-subsidiary relationship" at issue. *See* Petition at 9-10.

B. This Case Does Not Give Rise To Any Conflict Among The Federal Courts

1. The Federal Courts Are Not Utilizing Different Legal Tests In Assessing Corporate Separateness For Purposes Of Jurisdiction And Service.

Because there is no constitutional issue before the Court, the majority of the Petition is devoted to an attempt to manufacture a conflict among decisions of the federal courts. Petitioners contend that the federal courts are applying three inconsistent and "essentially distinct" legal tests in assessing corporate separateness for purposes of jurisdiction and service: "corporate formality," "unity of enterprise" and "control." Petition at 19. Petitioners fail to cite any decision or other authority that discusses or even acknowledges the existence of three "essentially distinct" *legal* tests. That is not surprising, as there are no such different legal tests.

Judicial decisions as to whether the contacts of a resident corporation should be imputed to a nonresident affiliate turn on a factual, not legal, analysis. The "divergent" case law on which petitioners rely is not the result of applying differing legal standards; it is the natural product of a case-by-case factual inquiry in which courts focus on the characteristics of the particular relationship in question. While courts have focused on different factual attributes of the parent-subsidiary relationship in deciding whether service has been effected and personal jurisdiction can be exercised, they have not formulated inconsistent legal tests which limit their underlying inquiry to certain test criteria. Particular attributes have been examined only in the context of all of the facts and circumstances surrounding the relationship under review.

The cases cited by petitioners confirm the uniformity with which the federal courts of appeals have approached

the requisite inquiry. In *Quaker State Dyeing and Finishing Co. v. ITT Terryphone Corporation*, 461 F.2d 1140, 1143 (3d Cir. 1972) (cited in Petition at 15-16), for example, the Third Circuit recognized that the "issue is factual, upon which all relevant evidence must be considered . . . . [T]here is no single, simple test." In *Hargrave v. Fibreboard Corporation*, 710 F.2d 1155, 1160 (5th Cir. 1983) (cited in Petition at 16), the Fifth Circuit announced that "[a]ll the relevant facts and circumstances surrounding the operations of the parent and subsidiary must be examined to determine whether two separate and distinct corporate entities exist." Similarly, the Eighth Circuit explained in *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 637 (8th Cir. 1975) (cited in Petition at 16), that "[n]o all-embracing rule has been laid down under which the relationship between two corporations may be determined. The circumstances in each case must be examined . . . ." Petitioners' district court decisions — even those which purportedly adopted the "acid test" of "corporate formality" — are to the same effect. *See, e.g., Stanley Works v. Globemaster, Inc.*, 400 F. Supp. 1325, 1331-1332 (D. Mass. 1975) (cited in Petition at 16) ("[C]ourts have become more willing to look beyond the form to the substance of a corporate relationship . . . . [A] wide range of evidence — corporate structure, personnel, operations — is relevant.")

Petitioners' own cases thus recognize that the critical inquiry is factual in nature, focusing not on a particular determinative characteristic but on all facts and circumstances. The three "essentially distinct" tests are artificial and of petitioners' own making. Such creativity does not provide a basis for challenging the decisions of the courts below in this case.

2. The Holdings Of The Courts Below Were Properly Based On A Complete Examination Of The Relationship Between Phillips Petroleum And Phillips Norway.

Having invented their three "essentially distinct" legal tests, petitioners assert (in a classic example of bootstrap reasoning) that the district court adopted a "corporate formality" test in conflict with the views of "most courts." Petition at 16. The courts below, however, did not limit their analysis to any one aspect (formalities or otherwise) of the relationship between Phillips Petroleum and Phillips Norway. The district court engaged in an extensive factual inquiry which considered all of the facts and circumstances surrounding the relationship between the two corporations, and that inquiry was reviewed and approved by the Sixth Circuit. Petitioners' position is the product of a wishful, revisionistic reading of the opinions of the courts below.

Petitioners' contention that the district court applied a "corporate formalities" test is based on the court's statement that the contacts of one corporation would not be attributable to its affiliate "so long as the separation . . . is real and not merely superficial." Petition at 14, *quoting* Memorandum of Opinion at Appendix 16A. That language, however, does not suggest a myopic focus on mere formalities, either when standing alone or considered in context. It was taken from *In Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 n.26 (6th Cir. 1972), where the Sixth Circuit's analysis of the parent-subsidiary relationship, while not relevant to its decision, included examination of corporate purchasing patterns, negotiations conducted for the parent by another subsidiary and unspecified "other circumstances." *Id.*

Petitioners also ignore the cases discussed most extensively by the district court in analyzing whether the separation at issue here was "real and not merely superficial."

Both *Walker v. Newgent*, 583 F.2d 163 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979), and *Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695 (2d Cir.), *cert. denied*, 375 U.S. 831 (1963), involved a wide-ranging factual examination of the relationship between the two entities in question. Those cases did not turn on a rigid application of a "corporate formalities" test. Indeed, petitioners could have pulled language from *Blount* to support any or all of their alleged tests and actually did cite *Walker* as proof that courts do not confine the jurisdictional inquiry to mere formalities. *See Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d at 698 (subsidiary found not to be "department," "agent," "implement" or "puppet" of parent); Petition at 19 (citing *Walker*).[6]

The district court's decision does not evidence reliance on petitioners' "formalities" test. The cases cited and discussed indicate that the court recognized the need for a broad inquiry which considered all of the facts and circumstances pertaining to the relationship between Phillips Norway and Phillips Petroleum. Just such an inquiry was undertaken here — as petitioners have conceded, "the District Court held an evidentiary hearing. Plaintiffs filed hundreds of exhibits and the transcripts of twelve depositions, while defendants presented four days of testimony." Petition at 3. It was only after engaging in that exhaustive factual analysis and imposing the appropriate burden of proof on petitioners that the district court determined that

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[6] Incredibly, petitioners assert that the district court "relied heavily" on *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), which was not discussed in its Memorandum of Opinion. Petition at 14. At most, the district court relied on *Cannon* for a proposition with which petitioners agree: "the parent-subsidiary relationship does not, by itself, allow the exercise of jurisdiction over one entity on the basis of the other's contacts with the forum." Petition at 14 n.16.

the demonstrated relationship between the corporations was not such that jurisdiction over Phillips Norway could be acquired through Phillips Petroleum.

The Sixth Circuit was fully satisfied with the district court's factual inquiry, finding on the full record before it that the nature of the parent-subsidiary relationship had been "carefully examined." Sixth Circuit Order at Appendix 24A. The Sixth Circuit was equally satisfied with the propriety of the resulting dismissal of petitioners' claims against Phillips Norway. Like the district court, the Sixth Circuit did not limit its review to any one aspect of the relationship between the two corporations or rely on only one of petitioners' three "essentially distinct" legal tests. Instead, the affirmance invoked expansive concepts of corporate interrelationship — whether the subsidiary was "closely interconnected" with its parent, whether the subsidiary was "sufficiently integrated" with its parent, and whether the subsidiary was a "mere department or division" of its parent.[7] Sixth Circuit Order at Appendix 24A-25A.

Petitioners' real complaint is not with the rule of law applied by the lower courts here or any alleged conflict among the federal courts, but with the factual findings of the district court and the Sixth Circuit's affirmance of those factual findings. Such a complaint does not provide a basis for granting a writ of certiorari.

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[7] Even if federal courts actually did disagree as to the legal test to be applied in deciding whether jurisdiction over and service upon a nonresident corporation could be obtained through its resident affiliate, the nature of the district court and Sixth Circuit holdings here would make this case an inappropriate vehicle for resolution of such a conflict. The matter of "distinct" tests was not raised below by petitioners or argued by the parties. Neither the district court nor the Sixth Circuit addressed petitioners' tests or specifically relied on a particular test. In the context of this case, the second of petitioners' "Questions Presented for Review" is, at most, of theoretical interest.

C. This Court Should Not Substitute Its Judgment For That Of The Lower Courts By Transferring This Case To Another Forum.

In asserting that the lower courts should have transferred this case, petitioners contend that "litigants can only guess when they file suit as to the facts which will be unearthed after extensive discovery and the legal standard ultimately applied." Petition at 19. Petitioners here, however, knew from the outset of the litigation that Phillips Norway was a Delaware corporation; even the captions of their complaints so stated. They knew that Phillips Norway was subject to service of process and personal jurisdiction in Delaware. Petitioners were not "guessing" about jurisdiction; they were consciously electing to forum-shop, having concluded for their own reasons that the federal district court in Delaware and/or the Third Circuit would not be sufficiently receptive to their claims. Given the availability of Norwegian courts, even the maintenance of this suit in this country is the product of forum-shopping.

Petitioners must accept sole responsibility for the path which they and this case have traveled. Shortly after the complaints herein were filed, Phillips Norway filed motions to dismiss which challenged service of process and the exercise of personal jurisdiction in Ohio. Petitioners failed to request transfer at the district court level and only casually raised that matter for the first time on appeal. Indeed, petitioners fail even now to frame the propriety of transfer as a question for review by this Court.[8] Petitioners are simply unsuccessful forum shoppers. They cannot now be heard to assert that the interests of justice require that this case be transferred.

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[8] Supreme Court Rule 21.1 provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court."

CONCLUSION

There are no grounds for granting a writ of certiorari in this case. There is no constitutional issue before the Court. There are no "essentially distinct" legal tests being inconsistently applied by the federal courts. This case turns only on its own facts, and there is no "special and important reason" for those facts to be examined yet again. Accordingly, respondent prays the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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